products with an architectural character – that is, products that set standards upon which other applications depend.

Caching, for example, improves the accessibility and delivery of popular, on-demand media clips and mitigates the large traffic spikes typically caused when many users access breaking news events or popular new content.[98] Sophisticated hardware and software are needed to make caching work and to manage networks of caching servers. Acting in concert, AOL/Time Warner/Road Runner and AT&T/MediaOne/Excite@Home will be in a position to dictate those standards, on a timetable calculated to promote their own competitive advantage. The standard that emerges will almost inevitably favor cable at the expense of DSL and other broadband technologies.

Streaming video software (and the compression and encryption standards embedded within it) is perhaps at greatest risk, because this is the software that will permit IP-based digital video to compete directly against traditional cable programming. The intertwined consortia will have abundant power (and incentive) to control the pace of this software's development in order to limit competition against their traditional cable fare. By choosing which format they will use to encode their enormous libraries of content, and by choosing which format they will support on their extensive cable-centered Internet-access networks, the two consortia will be in a position to

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will have a "permanent presence" on the Netcenter homepage. This "permanent presence" will undoubtedly increase CNN's market share. Under a separate agreement, AOL-owned ICQ, the world's largest portal with 50 million users, and CNN Interactive, will develop a co-branded news offering to be distributed through ICQ's Website and the ICQ client. This agreement gives CNN a prominent presence on ICQ's News Channel, and establishes CNN Interactive as the primary news content provider for ICQ's users. AOL Press Release, *America Online and Time Warner Announce New Content and Promotional Agreements*, Feb. 16, 2000, *available at* <http://media.web.aol.com/media/press.cfm?>.

[98] Inktomi Press Release, *Inktomi and RealNetworks Team Up to Create World's First Cache for Streaming Media*, Aug. 11, 1998, *available at* <http://www.inktomi.com/new/press/rni.html>.

pick a single winning streaming video software vendor and to make sure that its product is optimized to their technology.[99]

As noted earlier, cable operators have a long history of leveraging their market power in conduit into further market power in content. AOL has already shown that it, too, knows how to play the game. AOL has successfully leveraged its position as the nation's largest ISP into a dominant position in the adjacent content market for instant messaging.[100] AOL has likewise exploited its market power in the ISP layer to force content providers to give AOL equity stakes in their programming.[101]

IV. Horizontal Effects of the Merger.

Applicants claim that their "merger is not a horizontal merger."[102] The facts are otherwise.

A. AOL and Time Warner Are Actual and Potential Competitors in the Provision of Residential Broadband Internet Access.

The residential market for broadband Internet access is served by only a handful of players. Road Runner and Excite@Home are by far the two largest, serving 32 and 37 percent of all broadband subscribers, respectively. The remaining subscribers are splintered among a handful of other cable operators and several DSL/ISP and DBS competitors.

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[99] As discussed in greater detail below, the companies have already crippled this market by applying a 10-minute video collar on streaming video broadcasts.

[100] With over 50 million users, AOL's "AIM" service has rapidly emerged as the overwhelmingly dominant player in the instant messaging market. AOL Press Release, *AOL & Time Warner Will Merge to Create World's First Internet-Age Media & Communications Company*, Jan. 10, 2000, *available at* <http://media.web.aol.com/ media/press.cfm?>.

[101] Nick Wingfield, *Internet Startups Flock to AOL*, WSJ.com, Apr. 3, 2000, *available at* <http://www.zdnet.com/zdnn/stories/news/0,4586,2504498,00.html?chkpt+zdhpnews01>.

[102] Application at 1.

Road Runner and Excite@Home are even more dominant in terms of the numbers of homes they pass (more than 83 million) – a strong predictor that these companies will retain high-market shares in the future.[103] Most of these contracts extend well beyond the next two years,[104] which is to say, beyond the standard time-frame of analysis in merger reviews.

AOL is a recent entrant into the broadband Internet access market, but there is no serious doubt about its ability quickly to become one of the largest. An independent AOL would not own the physical facilities needed to provide last-mile transport, but it would nonetheless play a major competitive role as a reseller of high-speed services offered by others. Until the advent of this merger it was poised to do so, and, as noted earlier, had already negotiated several major resale contracts with non-cable providers of high-speed access services.

With those contracts in hand, AOL began offering its broadband service, AOL Plus. (The Applicants barely mention this new service in their filings,[105] despite the Commission's specific request for more information about the company's promise to provide "new, high-quality content and interactive services."[106]) But for this merger, there is every reason to expect that (a) AOL would have aggressively marketed AOL Plus to all its narrowband subscribers over the next two years; (b) AOL would have used a conduit-neutral strategy, reselling cable, DSL,

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[103] *See supra* note 45.

[104] Indeed, as noted, Excite@Home recently extended its contracts with cable partners AT&T, Cox, and Comcast to 2006 at the earliest. *See also* G. D. Campbell, Merrill Lynch Capital Markets, Investext Rpt. No. 2070937, *Canada Telecom Services: Weekly Comment*, Industry Report at *5 (Feb. 8, 2000) (Time Warner expects to "double its Road Runner base during 2000").

[105] The Applicants merely state that "AOL has formed a strategic alliance with Hughes Electronics Corporation to make its high-speed Internet service, 'AOL-Plus,' available nationwide via the DirecPC satellite Internet network, on a non-exclusive basis." Supplemental Filing at 17.

[106] Letter from Christopher J. Wright, General Counsel, FCC, to Arthur H. Harding, Fleischman & Walsh, *et al.*, *AOL/Time Warner Application for Consent to Transfer of Control*, CS Docket No. 00-30, at 2 (Mar. 6, 2000). This Commission has also made it clear in other merger proceedings that it would consider any and all plans for future market participation "as potentially relevant to the analysis of market participants. Accordingly, the facts and

satellite, and other media as available; and (c) a substantial percentage of AOL's narrowband subscribers would have quickly become AOL broadband subscribers, relying on AOL to bundle AOL's content with broadband access services provided by others.[107] With every incentive to remain conduit-neutral, an independent AOL would quickly and inevitably emerge as a major horizontal competitor against the twin cable consortia.

The competitive pressure that an independent AOL could bring to bear becomes clearer still when one considers what it takes to compete seriously in the provision of high-speed Internet access and content services. Entry barriers are high – much higher than they are in the narrowband Internet universe, which simply piggybacks on the existing telephone infrastructure. Broadband services require complex and expensive arrays of local caching servers,[108] and a large supply of new software to manage the caches, the streaming video, the encryption of copyrighted multimedia content, and so forth. Broadband services also require much faster links to backbone networks – which only a handful of the largest players can readily secure. The AT&T/Excite@Home consortium already owns its own, and the Time Warner/Road Runner consortium, as noted earlier, has been actively engaged in negotiating long-term contracts with

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circumstances concerning such planning should be forthrightly presented to the Commission." *Bell Atlantic/NYNEX* ¶ 75. The Applicants' submission is anything but forthright.

[107] Given the Applicants' omission of any mention of AOL Plus, and the little public information about this new service, it is difficult to discern the exact time frame that it will become available to all of AOL's subscribers and what it will cost. But, as one Internet analyst has noted, "[i]f anyone can market broadband services, it's AOL." D. Hopper, *Merger May Allow More Users to Taste Fruits of Broadband*, CNN.com, Jan. 10, 2000 <http://europe.cnn.com/2000/TECH/computing/01/10/aoltw.broadband> (quoting Zia Daniell Wigder, analyst at Jupiter Communications). Other analysts agree. *See* S. Reamer, SG Cowen Sec. Corp., Investext Rpt. No. 2041581, *America Online*, Company Report at *1 (Jan. 11, 2000); A. N. Newman, *supra* note 31, at *24; P. Noglows, Hambrecht & Quist Inc., Investext Rpt. No. 2056519, *Electronic Arts*, Company Report at *3 (Jan. 26, 2000).

[108] These servers store and deliver frequently used data so as to reduce traffic loads through higher levels of the Internet. *CacheFlow Upgrades Caching Servers*, Internetnews.com, Sept. 30, 1998 <http://www.internetnews.com/isp-news/print/0,1089,8_44701,00.html>; C. Babcock, *Managing Your Cache Flow*, Inter@ctive Week, Feb. 24, 2000 <http://www.zdnet.com/intweek/stories/news/0,4164,2445330,00.html>.

AT&T. AOL has negotiated its own advantageous backbone arrangements, too. Very few other competitors, actual or potential, are in a comparable position to do so.

B. Broadband Portals and Content.

The merger will likewise kill the incentive that AOL previously had to transform AOL Plus into a major competitor of Road Runner's portal and content services. The all but inevitable outlook now is for AOL either to supplant Road Runner or to absorb it. The same goes for Excite@Home, if the links between the twin cable consortia are permitted to stay in place.

As noted, AOL already dominates the provision of content in the narrowband market,[109] and Time Warner is the world's biggest "media giant."[110] The merger will unite all of this content under unitary control, making AOL/Time Warner by far the largest broadband content provider.[111] And on top of that, the entanglements between the Applicants and the AT&T/MediaOne consortium will add Liberty's vast content holdings to the mix.[112]

C. The Merger Eliminates AOL's Incentives To Become a Major Competitor to Cable in the Provision of Multichannel Video Programming.

Internet "broadcasters" present a grave competitive threat to cable's longstanding hegemony over the MVPD market, which is far from competitive even with the inroads made by satellite services.[113] Streaming video certainly has the potential to emerge as a major source of

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[109] *See, e.g.*, Ianthe J. Dugan, *AOL to Acquire Time Warner in Record $183 Billion Merger*, Wash. Post, Jan. 11, 2000, at A1.

[110] J. Schoen, *Time Warner Posts Strong Profits Driven By Cable TV, Publishing*, MSNBC (visited Apr. 12, 2000) <http://www.msnbc.com/news/393522.asp>. *See also* Time Warner, *Time Warner 1999 Fact Book* (visited Apr. 20, 2000) <http://www.timewarner.com/corp/about/pubarchive/factbook/1999fb.pdf> (*e.g.*, CNN.com).

[111] *AOL, Time Warner Merger – Road to Convergence*, Bus. Wire, Jan. 10, 2000.

[112] *See* AT&T/MediaOne Application at 9.

[113] *See, e.g.*, Fifth Annual Report, *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 13 FCC Rcd 24284, ¶ 6 (1998) (finding "that cable television continues to be the primary delivery technology for the distribution of multichannel video programming and continues to occupy a

video programming over the next two years.[114] Until the merger was announced, AOL had a powerful incentive to develop streaming video content and was on its way to doing so.[115]

The cable consortia, by contrast, are doing their utmost to cripple and limit the development of the streaming video market. Time Warner applies a ten-minute "video collar" to broadcast-quality video accessed via the Road Runner service.[116] Excite@Home does the same.[117] The cable companies' incentives are as obvious as their anticompetitive actions are brazen: they do not want to lose their traditional programming and video revenues to a rabble of competitive upstarts offering a much wider variety of streaming video choice over the Web.

The Applicants blithely assert that their merger will "generate new, enticing next-generation products and services."[118] But here again, they simply fail to address the clear

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dominant position in the MVPD marketplace. As of June 1998, 85 percent of all MVPD subscribers received video programming service from local franchised cable operators compared to 87% a year earlier.").

[114] Even with the low-speed connections on which most customers must still rely, radio and a rapidly growing number of TV stations are already being widely distributed over the Internet, albeit slowly and with poor quality. *See Digital Tornado* at 41. The volume of radio traffic "broadcast" over the Internet almost quadrupled between April 1997 and May 1998, from 40,000 broadcast hours per week to 150,000 broadcast hours. Jeff Sweat, *Streaming Media a Boon to Intranets*, InformationWeek, May 7, 1998 <http://www.techweb.com/news/story/TWB19980507S0022>.

[115] For instance, AOL formed partnerships with DIRECTV and Gemstar International Group Limited to provide video offerings. AOL Press Release, *America Online, Inc. Announces Key AOL TV Partnerships*, May 11, 1999, *available at* <http://media.web.aol.com/media/press.cfm?>; AOL Press Release, *America Online and Gemstar Announce Licensing Agreement for Deployment of AOL-TV Electronic Programming Guides*, May 25, 1999, *available at* <http://media.web.aol.com/media/press.cfm?>. Analysts predicted that cross-branding with AOL would put these companies in a better position to compete with cable operators. Michael White, *AOL Invests in Satellite TV Service*, AP Online, June 22, 1999. Even without such links, AOL would be positioned to emerge as a major competitor of interactive video programming because of its strong customer base for Internet access and content. Some predict it would be the Microsoft of interactive television. Jim Hu & Jeff Pelline, *Wall Street Gets Glimpse of AOL TV*, CNET News.com, Feb. 11, 2000 <http://www.news.cnet.com/news/0-1005-200-1547861.html>.

[116] *Do They Have Anything in Common?*, Economist, Feb. 13, 1999, at 61.

[117] Fred Dawson, *RealNetworks, @Home Team Up on Streaming*, Multichannel News, Jan. 18, 1999, at 2.

[118] Application at 10. The Applicants provide no affidavits or other support for this claim and therefore fall well short of their burden under *Bell Atlantic/NYNEX*.

economic incentive they have to balance revenue gains from new services against revenue losses from old ones, especially in light of their strong ties with the AT&T cable consortium. An independent AOL would have nothing to balance – all its revenues would come from the new medium of the Internet, none from the old medium of analog cable. The combined company will have one foot in each revenue stream and will have the incentive to maximize the joint revenues from both – *not* to maximize the new, competitive revenues at whatever cost that may entail to the old.

Regrettably, therefore, the balancing within the merged AOL/Time Warner must almost inevitably tilt sharply in favor of the old – just as has already occurred within the Time Warner/Road Runner family, when the choice had to be made between new streaming video and old cable fare. A merged AOL/Time Warner will have far more to gain by stringing out the old stream of revenues in the analog cable markets, in which the cable consortia have overwhelming market power, than in promoting, wide-open competition in new Internet-video markets, in which any upstart can peddle new video fare.

V. Proposed Conditions.

The Commission cannot allow this merger to go through without significant conditions aimed at (a) untangling and *fully* separating the AOL/TimeWarner/Road Runner consortium from the AT&T/MediaOne/Excite@Home consortium, and (b) ensuring that the AOL/TimeWarner/Road Runner consortium itself provides open access to both broadband conduit and content, to prevent the vertical leveraging of the one into the other, from either side of the divide.

The Commission should – and as a matter of law *must* – be guided here by the provisions of the 1992 Cable Act, and also by closely analogous provisions in antitrust consent decrees already crafted to forestall the types of anticompetitive harms threatened here.

A. The Commission Must Prohibit Any Equity Links Between AOL/Time Warner and AT&T or Any Long-Term Contracts or Sweetheart Deals.

The gravest dangers to competition stem from the thicket of contractual and equity links between the AOL/Time Warner/Road Runner consortium on the one hand, and the AT&T/MediaOne/Excite@Home consortium, on the other. These links must be completely severed.

At the very least, this is essential to protect the Commission's future ability to regulate cable companies effectively – or so the Commission itself has maintained in parallel instances. The public interest test, the Commission has held, considers "whether the merger . . . would otherwise frustrate our implementation or enforcement of the Communications Act and federal communications policy."[119] If the companies have major equity stakes in each other, together they will account for 80 percent of the homes passed by cable. This will limit the effectiveness of benchmarking according to the Commission, and the Commission "would be forced, contrary to the 1996 Act and similar state laws, to engage in less efficient, more intrusive regulatory intervention in order to promote competition and secure quality service at reasonable rates for customers."[120]

Severance is also necessary to be consistent with Congress's directive to the Commission to establish "reasonable limits" on the number of subscribers that affiliated cable systems may

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[119] *AT&T/TCI* ¶ 14; *SBC/Ameritech* ¶ 102.

[120] *SBC/Ameritech* ¶ 101.

amass.[121] As the Commission recently stated, these limits have "everything to do with the fact that [the industry-dominant cable operators'] size would permit them to control public access to video programming."[122]

This concern is overwhelming here. If two massive cable consortia that pass 80 percent of all U.S. homes have contractual and equity stakes in each others' success, they will inevitably coordinate their behavior to their mutual advantage. They will control not only programming markets, but also markets for broadband content, applications, and related software.[123] So long as they remain tightly linked, they will represent a level of concentration that defies any reasoned application of the subscriber limits.

The proposed safeguards that AT&T and MediaOne have submitted as part of their merger review[124] fail to impose a level of separation that is anywhere near sufficient to protect competition. Preventing officers of AT&T from serving as officers or directors of Time Warner Entertainment is at most a modest start. The main risks of anticompetitive coordination stem from contracts, sweetheart deals, and the simple knowledge that one company is the other's

[121] 47 U.S.C. § 533(f)(1)(A). In response, the Commission established a 30-percent limit on the number of homes passed nationwide that any one entity can reach, including cable systems in which it has an attributable interest. *See* 47 C.F.R. § 76.503(a); *see also Second Report and Order* ¶ 3. The Commission voluntarily stayed its subscriber-limitation rules pending the outcome of a challenge by Time Warner in the D.C. Circuit. *See Daniels Cablevision, Inc. v. United States*, 835 F. Supp. 1, 10 (D.D.C. 1993), *appeal filed sub. nom. Time Warner Entertainment Co., L.P. v. FCC*, Nos. 94-1035 (and consolidated cases) (D.C. Cir. argued Dec. 3, 1999). If the D.C. Circuit upholds the limit, the Commission has stated its continued allegiance to the 30-percent cap. *See Reconsideration Order* ¶ 77.

[122] Brief for the FCC and the United States at 20-21, *Time Warner Entertainment Co., L.P. v. FCC*, No. 94-1035 (and consolidated cases) (D.C. Cir. filed Aug. 13, 1999) ("FCC Brief").

[123] Competitors are already feeling the sting. "This leverage is very real; in the few instances where they dare to speak to the issue, unaffiliated programmers admit that they are forced to offer cable operators below-market prices in order to obtain carriage." Comments of EchoStar Satellite Corp. at 6, *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CS Docket No. 99-230 (FCC filed Aug. 6, 1999).

[124] *See Ex Parte* Letter from Michael H. Hammer, Willkie, Farr & Gallagher, to Magalie Roman Salas, Secretary, FCC (FCC filed April 18, 2000).

largest shareholder. The AT&T/MediaOne "safeguards" do nothing to prevent express anticompetitive contracts, still less the tacit "understandings" that every company must inevitably have with its largest shareholder. And the safeguards do nothing to address Internet content or access. They conspicuously speak only to video programming and cable systems.

The Commission must insist that AOL and Time Warner divest their interest in any property that they co-own with AT&T, and that AT&T divest its interest in any property it co-owns with Time Warner.[125] Similarly, to avoid contractual means to the same end, any sweetheart deals, joint ventures, and exclusive contracts between the companies should be forbidden. In other words, AOL/Time Warner should be prohibited from providing content, access, or distribution to AT&T or any if its affiliates on terms that are not available to unaffiliated firms. AT&T and its affiliates should likewise be prohibited from providing content, access, or distribution to AOL/Time Warner or any of its affiliates on terms that are not available to unaffiliated firms. The Commission must insist on a Chinese wall between these two powerhouses to prevent the disastrous competitive consequences that would result from their coordinated behavior.

B. The Commission Must Impose Conditions That Prevent AOL/Time Warner from Linking Its Content and Transport.

Many of the same competitive harms threatened by this merger were posed by the unregulated cable companies before the 1992 Act and the Time Warner/Turner union. Accordingly, many of the same solutions are called for now.

[125] For a similar condition, *see Time Warner/Turner Consent Decree* § II (A) (requiring TCI and LMC to divest TIC's and LMC's interest in Time Warner and TCI's and LMC's Turner-related businesses).

1. Preventing AOL/Time Warner from Leveraging Content.

The Commission must ensure that the combined AOL/Time Warner cannot leverage its content to impede competition from other providers or to gain additional power in the content market. The 1992 Cable Act prohibits cable operators from "unduly or improperly" influencing programming vendors in their dealings with unaffiliated distributors,[126] from discriminating against those competitors in the terms offered,[127] and from entering exclusive contracts with affiliated programmers.[128] The TCI/Liberty consent decree likewise barred the signatories from refusing to sell programming to competing cable operators, or from selling it on discriminatory terms.[129] The Primestar decrees required the cable companies to make their content available to competitors on reasonable, nondiscriminatory terms.[130]

Similarly, the Commission must bar the merged company from limiting access to its content via other distribution media and from requiring independent distributors to purchase unreasonably large bundles of AOL/Time Warner content.[131] The Commission must further

[126] 47 U.S.C. § 548(c)(2)(A); 47 C.F.R. § 76.1002(a).

[127] 47 U.S.C. § 548(c)(2)(B); 47 C.F.R. § 76.1002(b). This prohibition applies to both price and non-price forms of discrimination, such as unreasonable refusals to deal. *See* Notice of Proposed Rulemaking, *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage*, 8 FCC Rcd 194, ¶ 15 (1992).

[128] 47 U.S.C. § 548(c)(2)(C); 47 C.F.R. § 76.1002(c).

[129] *See Competitive Impact Statement*, 59 Fed. Reg. at 24727.

[130] *Primestar New York Decree*, 1993-2 Trade Cas. (CCH) ¶ 70403, §§ IV(A), IV (B). They also barred cable companies from entering or renewing exclusive distribution arrangements, from entering into other arrangements that limit a programmer's rights to deal with competing distributors, or from engaging in any kind of retaliatory conduct against programmers providing programming to cable competitors. *Id.* §§ IV(C), IV(E), IV(F); *Primestar Federal Decree* §§ IV(A), IVIV(B); (C)(3).

[131] *Time Warner/Turner Consent Decree* § V.

require AOL/Time Warner to provide, upon request, any of its content to competing ISPs or MVPDs on terms no less favorable that than it provides itself.[132]

2. Preventing AOL/Time Warner from Leveraging Conduit: Financial Interests in Unaffiliated Content Providers.

The Commission must ensure that the combined company does not leverage its market power in broadband residential access to dominate the market for broadband portals or Internet content. The Commission must guarantee, as it has in the past, that there remains adequate capacity for non-affiliated programming vendors.[133]

In 1992, Congress directed the Commission to establish program-carriage rules[134] to prevent the same type of discrimination against unaffiliated video programming vendors.[135] The Commission's rules accordingly prohibit a cable operator from (1) conditioning carriage of a programming service upon receiving a financial interest in the service; (2) coercing a programming vendor to provide exclusivity as a condition of carriage and retaliating against a vendor for not providing exclusivity; and (3) discriminating against a programming vendor on the basis of affiliation or nonaffiliation.[136]

To the extent that Internet service providers allow access to traditional video programming, such as broadcasts of ESPN, they are certainly providing programming that is

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[132] *Id.*

[133] For example, the Commission established regulations for open video systems. *See* Second Report and Order, *Implementation of Section 302 of the Telecommunications Act of 1996*; *Open Video Systems*, 11 FCC Rcd 18223, ¶ 61 (1996).

[134] *See* 47 U.S.C. § 536.

[135] *Id.* § 536(a)(3).

[136] 47 C.F.R. § 76.1301.

comparable to that provided by a television broadcast station.[137] The risks of discrimination are also the same. The Commission must therefore prohibit AOL/Time Warner from extracting a financial interest in video programming, cable services, or Internet services as a condition for carriage on its cable or Internet access service. The Commission must likewise prohibit AOL/Time Warner from coercing other content providers to provide exclusive rights against any other Internet service provider or broadband conduit.

3. Preventing AOL/Time Warner from Leveraging Conduit: Open Access to AOL/TimeWarner Cable Systems.

The Commission must require AOL/Time Warner to provide open access to its cable systems. The letter and the spirit of the 1992 Act require no less.[138] In the 1992 Cable Act, Congress directed the Commission to prescribe rules establishing "reasonable limits" on the number of channels in a cable system that can be occupied by a video programmer in which a cable operator has an attributable interest.[139] The limit is designed, as the Commission recently explained, "to address the fact that 'vertical integration gives cable operators the incentive and ability to favor their affiliated programming services'"[140] and "to ensure that a cable operator [does] not unfairly exclude non-cable-affiliated programmers from its system."[141]

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[137] *See* 47 U.S.C. § 522(20). Recent commercial developments show that Internet video is comparable to – and competing with – broadcast video. *See generally* Robin Lloyd, *Apple Tackles Net TV*, CNN.com, July 22, 1999 <http://cnn.com/TECH/computing/9907/22/quicktime.tv/>; Christopher Jones, *Net Video Coming of Age?*, Wired News, Mar. 23, 1999 <http://www.wired.com/news/news/technology/0,1282,18645,00.html>; Marc Graser, *Trimark Webbing Up*, Variety.com, Aug. 4, 1999 <http://www.variety.com/search/article.asp?article ID=1117750019>.

[138] As Bell Atlantic has argued, it appears that the AT&T/MediaOne merger will result in an outright violation of these rules. *See* Bell Atlantic Corporation's Petition to Deny the Application at 9, *Application for Consent to the Transfer of Control of Licenses, MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee*, CS Docket No. 99-251 (FCC filed Aug. 23, 1999).

[139] For cable systems with channel capacity of up to 75 channels, the Commission has adopted a 40-percent limit. 47 C.F.R. § 76.504(a).

[140] FCC Brief at 27 (quoting *Senate Report* at 25).

[141] *Id.* at 41.

Absent binding commitments, the intertwined cable consortia will gain the same ability to discriminate. The greater efficiencies of packet switching dictate that the effective bandwidth is far greater and far more valuable for Internet access than for the channels assigned to conventional video programming.[142] Indeed, the broadband access channel should be viewed as a port that contains more piers than all other smaller ports combined. Producers of video programming will increasingly depend on this port to gain access to viewers, because this is the port that offers the most flexible, efficient form of access – on-demand to all audiences.

The Applicants claim that the merger will lead to a "marketplace solution to the 'open access' issue." If there is to be a solution from the merger, however, it should be binding, clear, and measurable, as has been the Commission's practice in other mergers.[143] The MOU is not binding. It leaves in place existing, long-term contracts that are anything but equal and open. It provides no assurance that competitors will have truly equal access to the Applicants' network or content. It provides no detail as to the terms and conditions affiliates and nonaffiliates will receive. Everything remains within the parties' own discretion.[144]

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[142] The services of AOL, Road Runner, and the like occupy at least two "channels." 47 U.S.C. § 522(4). A television channel uses roughly 6 MHz, and delivery of Internet services over a hybrid-fiber-coaxial cable network requires at least two channels, one for downstream traffic and another for upstream signals. Cable Datacom News, *Overview of Cable Modem Technology and Services* (visited Apr. 20, 2000) <http://cabledatacomnews.com/cmic/cmic1.html>. The two channels each ISP occupies on the spectrum understates the importance of those particular channels. The channels used for broadband access are worth at least as much as the rest of the channels combined. The price differential proves the point. The average cable subscriber pays approximately $30 per month for 54 channels of cable programming. Report on Cable Industry Prices, *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992*; *Statistical Report on Average Rates for Basic Service, Cable Programming Services, and Equipment*, 14 FCC Rcd 8331, ¶ 4 (1999). Cable-modem service averages about $40 per month. *Advanced Services Report* ¶ 87, Chart 3.

[143] *See, e.g., SBC/Ameritech*; *Bell Atlantic/NYNEX*.

[144] Senate Judiciary Committee Orrin Hatch called the document "vaporware," pointing out that "it is neither binding on the parties, nor is it definitive." *U.S. Senate Panel Concerned About AOL/Time Warner Merger Impact on Consumers*, AFX European Focus, Mar. 1, 2000. Senator Diane Feinstein similarly noted that the MOU "does not look like a binding commitment to open access." Brooks Boliek, *AOL, TW Again Promise Access, But Hill Dubious*, Hollywood Rep., Mar. 1, 2000.

C. The Commission Must Apply the Program Access Rules Regardless of How the Content is Distributed.

The 1992 Cable Act bars cable operators from using their control over programming to suppress alternative means of distribution.[145] The Act's program access regime prohibits cable operators from "unduly or improperly" influencing programming vendors in their dealings with unaffiliated distributors[146] or from discriminating against those competitors in the terms offered.[147] The Act and the Commission's implementing restrictions,[148] however, only apply to satellite-delivered programming.[149]

All video programming, including all the content distributed over conventional cable TV channels, is now moving toward digital format,[150] and once the content is digital, it can readily be distributed to cable head-ends via the Internet. Cable operators have already begun using fiber-optic delivery as an alternative. As they migrate their content to Web-based distribution, they can apparently escape their program-access obligations entirely.[151]

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[145] 47 U.S.C. § 548; 47 C.F.R. § 76.1002.

[146] 47 U.S.C. § 548(c)(2)(A); 47 C.F.R. § 76.1002(a).

[147] 47 U.S.C. § 548(c)(2)(B); 47 C.F.R. § 76.1002(b). This prohibition applies to both price and non-price forms of discrimination, such as unreasonable refusals to deal. *See* Notice of Proposed Rulemaking, *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and* Carriage, 8 FCC Rcd 194, ¶ 15 (1992).

[148] 47 C.F.R. §§ 76.1000-.1004.

[149] Memorandum Opinion and Order, *Echostar Communications Corp. v. Comcast Corp.*, 14 FCC Rcd 2089, ¶ 21 (1999).

[150] Digital formats are already easier to store, edit, and process; they will soon be easier and cheaper to create at the outset.

[151] Comcast, for example, has begun delivering sports channels over fiber and has denied access to those channels to competitors such as overbuilder RCN and Echostar. RCN has asked the Commission "to face up to the commercial reality that the cable industry is resorting to terrestrial transmission in large part to avoid the program access provisions of § 628 of the Act." Comments of RCN Corp. at 20-21, *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CS Docket No. 99-230 (FCC filed Aug. 6, 1999).

The Commission is "aware of the potential for this type of migration and the possible need to address it in the future."[152] The future is now. Regrettably, the rise of the twin cable consortia and their captive Internet portals and Web-based content providers could well signal the demise of cable's only serious competitor in MVPD, DBS. This merger signals the start of a massive trend of "vertically integrated programmers beg[inning] to switch from satellite delivery to terrestrial delivery for the purpose of evading the Commission's rules," and the Commission must now impose "'an appropriate response to ensure continued access to programming.'"[153]

The Commission must condition its approval of the merger on AOL/Time Warner's agreement to comply with the program access rules, regardless of the technology used to distribute its content at the wholesale level.

D. The Commission Should Require a Biannual Audit To Ensure Open Access and Non-Discrimination.

Because the combined company could readily discriminate against its competitors through the use of technology and various pricing and bundling mechanisms, and because it could attempt to form an informal alliance with AT&T, the Commission must actively ensure that the merged company does not engage in exclusionary conduct. In that vein, the Commission should require the combined company to submit to an independent third-party audit to check for compliance with the merger conditions. AOL/Time Warner should provide the auditor with,

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[152] *AT&T/TCI* ¶ 37.

[153] *Id.* ¶ 37 n.119 (quoting Memorandum Opinion and Order and Notice of Proposed Rulemaking, *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*; *Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage*, 12 FCC Rcd 22840, ¶ 50 (1997)).

among other things, information on all of its carriage agreements, service agreements, and content agreements.[154]

Conclusion

The proposed merger of AOL and Time Warner will harm the public interest unless it is granted only subject to the above stated conditions.

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[154] *See Time Warner/Turner Consent Decree* §§ VIII, X.

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of April, 2000, I caused copies of Comments of SBC Communications Inc. to be served upon the parties listed below by hand delivery (indicated by asterisk) or by first-class mail, postage prepaid.

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